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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1950.

No. 511

CHARLES SICKMAN et al., Petitioners,
vs.
THE UNITED STATES OF AMERICA, Respondent.

PAUL L. RYAL et al., Petitioners,
vs.
THE UNITED STATES OF AMERICA, Respondent.

CHARLES SICKMAN et al., Petitioners,
vs.
THE UNITED STATES OF AMERICA, Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals
for the Seventh Circuit

and

BRIEF IN SUPPORT OF PETITION.

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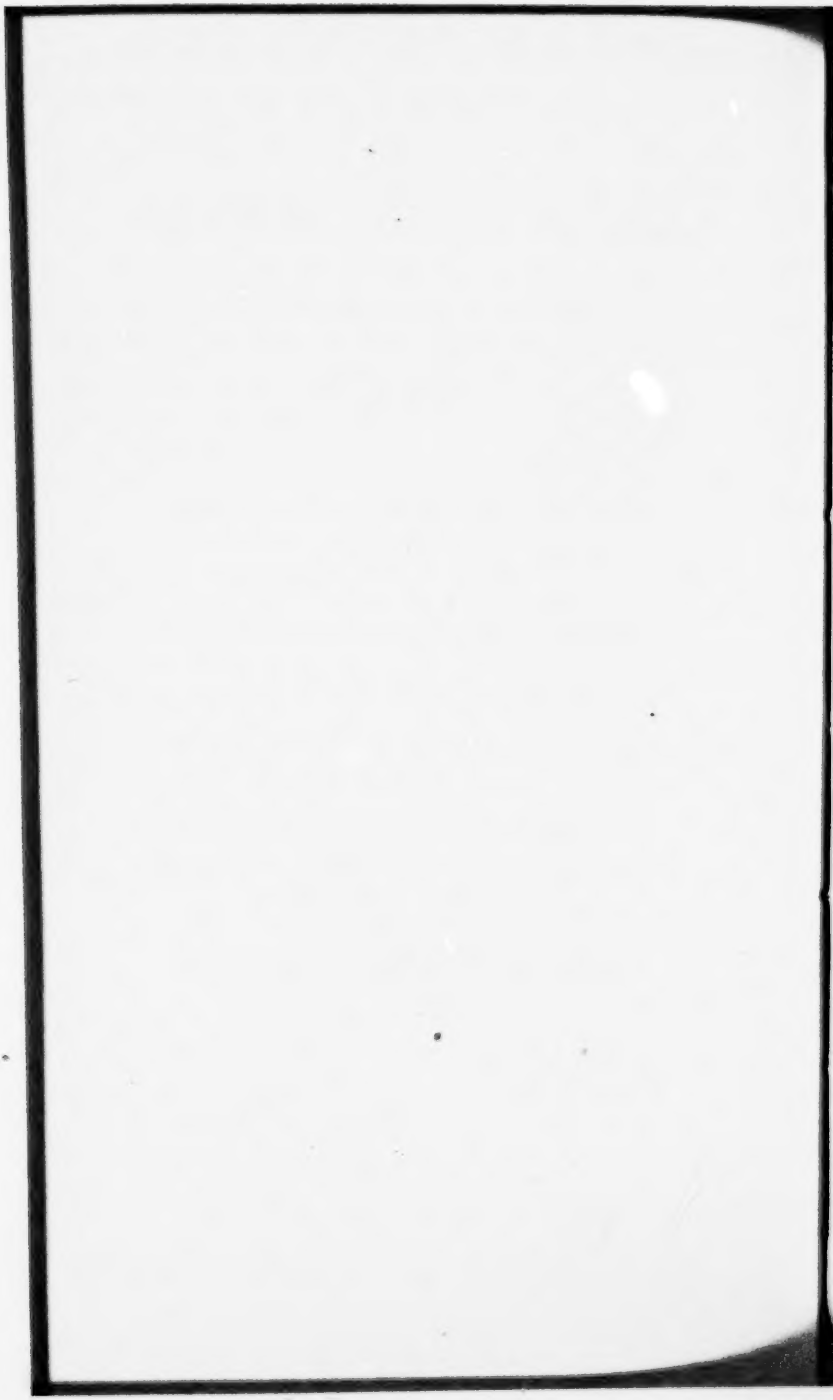

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PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Seventh Circuit.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States of America:

Your petitioners, Charles Sickman, Paul L. Ryal, Kenneth L. Martin, David V. Lansden, John A. Lansden, Robert L. Lansden, Joseph A. Regenstein, Jr., and S. N. Yates, respectfully present this petition for the issuance

of a writ of certiorari directed to the United States Court of Appeals for the Seventh Circuit and show to this Honorable Court the following:

I.

STATEMENT OF THE MATTER INVOLVED.

These actions were brought under the Federal Tort Claims Act, 28 U. S. C., Sec. 1346 (b), 2671-2680, to recover damages amounting to $26,500.00 for the alleged torts of defendant by reason of which crops belonging to plaintiffs were consumed and destroyed by migratory waterfowl, principally Canada geese. The District Court sustained defendant's motions to dismiss the amended complaints, and when plaintiffs failed to plead further, the actions were dismissed.

Thereupon plaintiffs appealed to the Court of Appeals for the Seventh Circuit, which on October 24, 1950, affirmed the dismissal by the District Court, 184 F. 2d 616-620.

These actions having been determined on motion to dismiss, all facts alleged in the complaints are admitted to be true.

Plaintiffs are the owners of or tenants on farms in Alexander County, Illinois (R. 2, 4, 5, 7-10). Such farms are located adjacent to or near the Horse Shoe Lake State Game Preserve (R. 2, 4, 5, 7-10) where large number of geese, principally Canada geese, concentrate and winter (R. 2, 5, 8). Such geese are migratory waterfowl, and the United States pursuant to treaties with Great Britain and Mexico and the Migratory Bird Treaty Act, 16 U. S. C., Sec. 703 et seq., has assumed the protection of such birds within the United States and is the owner of them and has them in its possession and control (R. 2-6, 8, 9).

Commencing in October and November, 1946, and again in October, 1947, and for some months after said respective dates (R. 3, 5, 8), substantial amounts of soy beans, corn and other crops belonging to plaintiffs were consumed and destroyed by geese (R. 3, 5, 8). The total value of the crops destroyed is alleged in the three complaints to be $26,500.00 (R. 4, 7, 9, 10).

Defendant acted or failed to act through its employees, agents and servants (R. 3, 6, 8).

Defendant knew of the predatory character of geese and the proclivities and propensities of geese to damage crops yet permitted them to congregate in vast numbers at the Horse Shoe Lake State Game Preserve and failed to feed them at said preserve and failed either to confine the geese within the preserve or to herd or drive the geese to other areas. The geese were kept stirred up by the use of aircraft, flares, explosives, bombs, etc. (R. 3, 6, 8-9).

Defendant took no steps to protect plaintiffs' crops from damage by geese, and the damage done by the geese to plaintiffs' crops interfered with the exclusive occupation, enjoyment, dominion and use of the same (R. 3, 6, 8-9).

Plaintiffs were at all times free from contributory negligence (R. 3, 5, 8).

The action or non-action of defendant, either or both, amounted to negligence, and defendant, in addition, created a nuisance, all of which resulted in damage to plaintiffs (R. 3-4, 6-9).

These actions were consolidated in the District Court for the purpose of disposing of defendant's motions to dismiss (R. 13-14), and were again consolidated in the Court of Appeals for the Seventh Circuit for all purposes (R. 30-32).

II.

BASIS OF THIS COURT'S JURISDICTION.

The date of the judgments of the Court of Appeals for the Seventh Circuit was October 24, 1950, said judgments having become final on said date since petitioners did not elect to file a petition for rehearing. The date of this application for a writ of certiorari may be taken as the date of the filing of the petition in the office of the Clerk of this Court.

This Court has jurisdiction to review by certiorari the judgment of the Court of Appeals for the Seventh Circuit by reason of 28 U. S. C., Sec. 1254. The jurisdiction of this Court is invoked under such sections and under Rule 38 of the Rules of the Supreme Court of the United States.

The time in which this application must be made is ninety days. 28 U. S. C. 2101 (c). Said Rule 38 sets forth what constitutes filing the petition in time.

III.

QUESTIONS PRESENTED.

1. Whether under the Federal Tort Claims Act, 28 U. S. C., Secs. 1346 (b), 2671-2680, petitioners have claims upon the basis of which relief may be granted.

2. Whether under the Federal Tort Claims Act and the Federal Rules of Civil Procedure petitioners have stated claims upon the basis of which relief may be granted.

3. Whether the exceptions to the Federal Tort Claims Act, 28 U. S. C., Sec. 2680, are to be strictly construed.

4. Whether the United States, under the facts alleged and the applicable law in the cases, is entitled to the ben-

efit of the exceptions to the Federal Tort Claims Act, found at 28 U. S. C., Sec. 2680 (a).

5. Whether the two exceptions to the Federal Tort Claims Act found at 28 U. S. C., Sec. 2680 (a), apply to every non-negligent act or omission in the execution of a statute or regulation and apply to every tortious act or omission regarding "a discretionary function or duty."

6. Whether the exception to the Federal Tort Claims Act by reason of "a discretionary function or duty" [28 U. S. C., Sec. 2680 (a)] applies to all acts or omissions of a federal agency which exercises discretion or whether it is limited in application to the situation that the discretionary act or omission in and of itself must have been the act or omission which gives rise to the claim for damages.

7. Whether tortious acts or omissions subsequent to the exercise or failure to exercise a discretionary function fall within the exception to the Federal Tort Claims Act found at 28 U. S. C., Sec. 2680 (a).

8. What is the relationship of the United States to migratory waterfowl as regards ownership, possession, custody or control, either actual or fictional.

9. Whether the words "private person" and "private individual" in the Federal Tort Claims Act, 28 U. S. C., Sec. 1346 (b), 2674, merely describe the position of the United States as regards suability or whether the words limit actions thereunder to torts that can only be committed by a private person as well as by the United States.

10. Whether activities of federal agencies heretofore characterized as governmental functions are automatically excluded from the coverage of the Federal Tort Claims Act, 28 U. S. C., Sec. 1346 (b), 2674.

11. What are the limits, if any, of the exception to the Federal Tort Claims Act under the discretionary function exception, 28 U. S. C., Sec. 2680 (a).

12. Whether the law of Illinois relating to tortious acts or omissions can be made the basis for placing liability on the United States under the Federal Tort Claims Act, 28 U. S. C. 1346 (b), 2674.

IV.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. These cases are new, novel and unique. Presented to the Court for determination is a problem that has never heretofore been passed upon by any Federal Court except the lower courts in these cases.

The problem in these cases arose in Alexander County, Illinois, and involves depredations committed on farmers' crop by migratory waterfowl which come under the Migratory Birds Treaty Act, 16 U. S. C., in 703 et seq. Such depredations are not peculiar to Alexander County, Illinois, but occur to a greater or lesser extent in almost every state in the Union and are especially acute, to name a few areas, in the Sacramento Valley in California, Montana, North Dakota, South Dakota, Nebraska and Arkansas.

2. The sections of the Federal Tort Claims Act, 28 U. S. C., Secs. 1346 (b), 2674, 2680 (a), involved in these cases have never been fully construed by the Court. Such sections are the most important sections in said Act and a full construction by the Court is needed so that decisions of lower Federal Courts will be consistent in the future.

3. These cases were determined on the basis only of amended complaints and identical motions to dismiss. The Court of Appeals for the Seventh Circuit used an approach to the allegations in the complaint that is not sanctioned by the Federal Rules of Civil Procedure and con-

flicts with the uniform holdings of such Court and other Courts of Appeals.

Carroll v. Morrison Hotel Corp., 7 Cir., 149 F. 2d 404, 406;

Kohler v. Jacobs, 5 Cir., 138 F. 2d 440, 441;

Dennis v. Village of Tonka Bay, 8 Cir., 151 F. 2d 411, 412;

Federal Rules of Civil Procedure: Rules 8 (a), 8 (e) (2), 12, 84; Appendix to Forms, Nos. 9, 14.

4. This Court in U. S. v. Aetna Cas. & S. Co., 338 U. S. 366, held that the doctrine that statutes waiving sovereign immunity must be strictly construed is not applicable to the Federal Tort Claims Act. The decision of the Court of Appeals for the Seventh Circuit in effect gives a liberal and broad construction to two of the exceptions to said Act, 28 U. S. C., Sec. 2680 (a), yet exceptions to statutes are generally strictly construed.

Midland Cooperative Wholesale v. Ickes, 125 F. 2d 618, 625-626;

Fleming v. Hawkeye Pearl Button Co., 113 F. 2d 52, 56.

This Court should determine what canon of construction applies to the exceptions to the Federal Tort Claims Act, 28 U. S. C., Sec. 2680.

5. The relationship of the United States to migratory waterfowl as regards ownership, possession, custody or control, either actual or fictional, has never been determined by this Court. The United States protects migratory waterfowl by virtue of the Migratory Bird Treaty Act, 16 U. S. C., Sec. 703 et seq., which was passed to implement the treaties with Great Britain and the United Mexican States, 39 Stat. 1702; 50 Stat. 1311. The determination of these cases rests largely on whatever that relationship may be, and until that relationship is deter-

mined by this Court, neither these petitioners nor others similarly situated nor even some of the states of the United States will know what the responsibilities and obligations of the United States are.

6. This Court, in **U. S. v. Aetna Casualty & Surety Co.**, in commenting on the phrases "private person" and "private individual" found in 28 U. S. C., Secs. 1346 (b) and 2674 of the Federal Tort Claims Act, said as follows, at page 370:

> ". . . the language of the Act indicates a congressional purpose that the United States be treated as if it were a private person in respect of torts committed by its employees, except for certain specific exceptions enumerated in the Act . . ."

And the Court further said, at page 380:

> "The broad sweep of its language assuming the liability of a private person . . ."

And:

> ". . . the Government must defend suits . . . as if it were a private person."

The fullest exposition of the words "private person" is found in **Cerri v. U. S.**, 80 F. Supp. 831, 833, which was not appealed and in which the United States apparently acquiesced.

The Court of Appeals for the Seventh Circuit in these cases in effect held that the United States was not liable under the Federal Tort Claims Act unless it committed a tort which could also be committed by a private person. This holding apparently conflicts with the **Aetna** and **Cerri** cases above referred to, since the words "private person" have usually been considered to describe the position of the United States under the Federal Tort Claims Act only

as regards suability and not as to the creation of a right of action.

The meaning to be given to the words "private person" and "private individual" is fundamental to the extent of the coverage of the Federal Tort Claims Act. Until that meaning is announced by this Court, confusion will exist in the lower courts, and if the interpretation adopted by the Court of Appeals for the Seventh Circuit in these cases prevails, the coverage of the Federal Tort Claims Act will be much more narrow than the language of the act indicates.

7. The exceptions to the Federal Tort Claims Act that are involved in these cases are found at 28 U. S. C., Sec. 2680 (a), and this Court has never construed said section.

The interpretation given to such section by the Court of Appeals for the Seventh Circuit in these cases conflicts with the interpretations given by other Federal Courts in the following cases:

Costley v. U. S., 181 F. 2d 723, 724-725;
Hambleton v. U. S., 87 F. Supp. 994, 995;
Oman v. U. S., 179 F. 2d 738, 740-741;
State of Maryland v. Manor Real Estate & Trust Co., 176 F. 2d 414, 419.

Those cases hold that the exercise of discretion does not clothe every act done subsequent thereto and in pursuance thereof with immunity from liability under the Federal Tort Claims Act or bring such act within the exception of 2680 (a), and further hold that the discretionary act or omission in and of itself must have been the act or omission which gives rise to the claim for damages in order for the section to apply.

8. In these cases the United States has argued that the law of Illinois relating to tortious acts or omissions can-

not be made the basis for placing the liability on the United States under the Federal Tort Claims Act.

The Court of Appeals for the Seventh Circuit did not discuss this point, but under Secs. 1346 (b) and 2674 there seems to be no other conclusion but that the liability of the United States is determined in these cases by the law of Illinois. Under the law of Illinois, a private person would be liable to petitioners for the torts alleged, and therefore the United States would be liable.

Moss v. Pardridge, 9 Ill. App. 490, 492;
Ulery v. Jones, 81 Ill. 403, 405;
McKee v. Trisler, 311 Ill. 536, 542-543;
Snap and Francis v. The People, 19 Ill. 80;
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A. T. & S. F. Ry. Co. v. Andrews, 338 Ill. App. 552, 568;
Skelly Oil Co. v. Universal Oil Products Co., 338 Ill. App. 79, 84-85;
Heck v. Schupp, 394 Ill. 296, 299-300.

See also Article II, Sec. 19, of the Constitution of Illinois.

Harper on Torts (1933), Secs. 165, 170-178;
O. W. Holmes, The Common Law (1881), pp. 2-4, 6, 22, 24-25, 34;
Rylands v. Fletcher (1868), L. R., 3 H. L. 330;
Farrer v. Nelson (1885), 15 Q. B. D. 258.

PRAYER.

Your petitioners therefore respectfully pray that a writ of certiorari be issued out of this Honorable Court, commanding the United States Court of Appeals for the Seventh Circuit to certify and send to this Court a complete transcript of the records and all proceedings in said Court of Appeals in the cause entitled "No. 10,101, Charles Sickman et al., Plaintiffs-Appellants, v. The United States of America, Defendant-Appellee," also in the cause entitled "No. 10,102, Paul L. Ryal et al., Plaintiffs-Appellants, v. The United States of America, Defendant-Appellee," also in the cause entitled "No. 10,103, Charles Sickman et al., Plaintiffs-Appellants, v. The United States of America, Defendant-Appellee," to the end that these causes may be reviewed by this Honorable Court, and that said judgments of the Court of Appeals be reversed and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and proper.

Respectfully submitted,

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THE UNITED STATES OF AMERICA, Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINIONS BELOW.

The opinion of the District Court has not been officially reported, but the memorandum opinion of the District Court is found at R. 14-18.

The opinion of the United States Court of Appeals for the Seventh Circuit is reported in 184 F. 2d 616-620.

II.

GROUNDS UPON WHICH JURISDICTION IS INVOKED.

A statement of the grounds, on which the jurisdiction of this Court is invoked, appears in the petition for writ of certiorari under the heading "Basis of This Court's Jurisdiction," and is, therefore, not repeated here.

III.

STATEMENT OF THE CASE.

A statement of the case, containing all that is deemed material to the consideration of the questions presented with appropriate page references to the record, appears in the petition for writ of certiorari under the heading "Statement of the Matter Involved," to which reference is hereby respectfully made.

IV.

SPECIFICATION OF ERRORS.

The Court of Appeals for the Seventh Circuit erred in each of the following respects:

1. In affirming the judgments of the District Court.

2. In failing to hold that the United States is liable for depredations by migratory waterfowl.

3. In failing to hold that the United States had ownership, possession, custody or control of migratory waterfowl sufficient to be held liable for their depredations.

4. In holding that, since a private person could not be held liable for trespasses by migratory waterfowl, when such birds were ferae naturae and had not been reduced to possession and existed in a state of nature, the United States could not be held liable under the Federal Tort Claims Act.

5. In failing to hold that a private person who occupied the same relationship to migratory waterfowl as does the United States would be liable under the Federal Tort Claims Act.

6. In holding that the District Court was without jurisdiction.

7. In holding that the test of liability of the United States under the Federal Tort Claims Act is whether a private person could be held liable for the same acts.

8. In failing to hold that the United States can be held liable under the Federal Tort Claims Act for acts or omissions that no private person, but only the sovereign, can do or fail to do.

9. In failing to hold that, under the law of Illinois, the United States would be liable to petitioners if the United

States was considered as a private person as regards suability.

10. In failing to hold that the words "private person" in the Federal Tort Claims Act refer to the right to sue the United States and not to the acts out of which the claims arose.

11. In holding in effect that negligent performance or omission to perform governmental functions is automatically excluded from the coverage of the Federal Tort Claims Act.

12. In holding that the petitioners' claims were prohibited within the first exception of the Federal Tort Claims Act, 28 U. S. C., Sec. 2680 (a).

13. In holding that defendant's acts and omissions were in the non-negligent execution of statutes and regulations within the meaning of 28 U. S. C., Sec. 2680 (a).

14. In holding that defendant's acts and omissions were in the execution of a duty discretionary or otherwise within the meaning of 28 U. S. C., Sec. 2680 (a).

V.

ARGUMENT.

In the petition for the writ of certiorari, under the heading "Reasons Relied Upon for the Allowance of the Writ," is found what petitioners believe is a concise summary of what can be argued. To expand greatly such statement would entail burdensome repetition and, therefore, reference is respectfully made to such heading in the petition.

POINT I.

Liability for animal trespass is based on ownership, possession, custody **or control**, and sometimes liability has been placed on a defendant in such type of case without any discussion at all of ownership, possession, custody or control. Harper on Torts (1933), Sec. 172. Some cases turn on knowledge of the vicious propensities of the animal. **Spring Co. v. Edgar**, 99 U. S. 645.

As permitted by Rule 8 (c) (2) of the Federal Rules of Civil Procedure, petitioners based their claims on many theories of animal trespass, ranging from defendant being an insurer downward. See Harper on Torts (1933), Secs. 170-178. Yet the Court of Appeals for the Seventh Circuit rejected each and every theory alleged by petitioners because migratory waterfowl committed the trespasses in these cases.

Trespass by migratory waterfowl has now become a national problem. The establishment of refuges for the protection of migratory waterfowl, whose protection is the primary responsibility of the United States under the Migratory Bird Treaty Act, 16 U. S. C., Sec. 703 et seq., has tended to concentrate the birds. The result is that farmers near such refuges are subject to continuing and

increasing depredations. Such refuges never provide enough food to keep the birds from foraging ultimately.

Years ago migratory waterfowl fed on acorns, wild grasses and seeds. Now they prefer, when available, valuable food crops such as corn, soy beans, wheat, rice and certain vegetable crops. Wheat and various legumes such as alfalfa and clover can not even be grown when migratory waterfowl thickly congregate.

The result is that agriculture in some areas, of which Alexander County, Illinois, is one, is put to additional hazards and risks.

Migratory waterfowl is protected to the detriment of citizens, for the protection of whom a government was established and exists.

This problem with its national implications is one for this Court to resolve, and this Court is apparently the last resort petitioners and others similarly situated have for a determination of their rights, if any.

POINT II.

The Court of Appeals for the Seventh Circuit placed a construction on the complaint which amounts to an implied rejection of the philosophy of pleading set forth in the Federal Rules of Civil Procedure.

It is felt that this Court should announce to all lower federal courts the requirements of pleading under the Federal Rules of Civil Procedure.

POINT III.

The applicable sections of the Federal Tort Claims Act are found at 28 U. S. C., Secs. 1346 (b), 2674, 2680 (a), and such sections read as follows:

Sec. 1346 (b):

"Subject to the provisions of chapter 171 of this title, the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, . . ., for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

Sec. 2674:

"The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages."

Sec. 2680 (a):

"The provisions of this chapter and section 1346 (b) of this title shall not apply to—

"(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."

In its opinion the Court of Appeals for the Seventh Circuit said:

> "Even if we assume that the district court had jurisdiction to adjudicate plaintiffs' claims, defendant still would have to prevail because a private person could not be held liable for the trespasses of animals which are ferae naturae, and which have not been reduced to possession, but which exist in a state of nature. The United States, considered as a private person, did not have any ownership, control or possession of these wild geese which imposed liability for their trespasses. On the merits we think that the amended complaints failed to state any claim upon which relief can be granted."

The interpretation to be given to the words "private person" and "private individual" that appear in Secs. 1346 (b) and 2674, respectively, is fundamental to the extent of the coverage of the Federal Tort Claims Act.

The Court of Appeals for the Seventh Circuit in the above quotation holds that the United States is only liable under the Federal Tort Claims Act for torts that can be committed by a private person as well as by the United States and automatically excludes any activities of Federal agencies that might heretofore have been characterized as governmental functions.

This holding of the Court of Appeals for the Seventh Circuit is apparently at variance with the language used by this Court in **U. S. v. Aetna Casualty & Surety Co.**, 338 U. S. 366, 94 L. Ed. 171, where the Court said, at page 370:

> ". . . the language of the Act indicates a congressional purpose that the United States be treated as if it were a private person in respect of torts committed by its employees, except for certain specific exceptions enumerated in the Act . . ."

And the Court further said at page 380:

> "The broad sweep of its language assuming the liability of a private person . . ."

And

> ". . . the Government must defend suits . . . as if it were a private person."

The only case which petitioners have been able to find which gives a full exposition of the phrase "private person" is the case **Cerri v. U. S.**, 80 F. Supp. 831, 833. That case went no further than the District Court, and its holding is apparently acquiesced in by the United States.

In that case a soldier on guard fired a shot while he was attempting to hold a civilian under arrest and seriously injured a woman who was an innocent bystander. Among other defenses, the United States contended it was not liable under the Act for negligence during the exercise of its sovereign power. At page 833 the Court said:

> "This is, apparently, a case of first impression, research of both court and counsel having produced no decision directly in point. Determination of the instant case, therefore, must rest on construction of the statute, keeping in mind the purpose of Congress in enacting it. The purpose of this act is the relinquishment by the Federal Government of its sovereign immunity against suits of this nature. Without such a statute, an individual who has suffered injuries as the result of negligence on the part of agents, servants or employees of the United States can receive compensation only through private bills passed by Congress. The need to avoid such a lengthy and cumbersome method has resulted in the passage of this statute. To reason that the United States cannot be here held liable because a municipality in California is protected by the sov-

ereignty of the state, is to ignore the plain meaning of the Federal Tort Claims Act and to deny the object sought by Congress. The purpose of the surrender of sovereign immunity in these particular cases cannot be ignored.

"The defense that this act does not apply to those cases wherein the negligence occurred during the exercise of a sovereign power of the United States, if heeded, would create a twilight zone of governmental activities in which the consent given by this statute could not be applied. Too numerous are the affairs of a purely governmental or sovereign nature, prohibited to or not duplicated by the activities of private individuals, to consider this to be the intent of Congress. Certainly, the statute itself makes no distinction between governmental activities of a sovereign nature and those of a proprietary nature, nor does it include within the claims exempted, 28 U. S. C. A., Sec. 943 (now Sec. 2680), those of this type.

"There can be no allegation that the Federal Tort Claims Act constitutes a delegation of sovereign power to any private individual. Read fully, the act is the simple giving of the consent of the United States to tort actions against itself.

"The phrase '* * * where the United States, if a private person, would be liable * * *,' 28 U. S. C. A., Sec. 921 and Sec. 931 [now Sections 1346 (b) and 2674], is not to be understood to mean that the United States can be sued only if a private person can be sued under the identical circumstances. This phrase does not determine the relationship of the government to its employees, but rather determines the relationship of the government to third parties. The act gives the consent of the United States to be treated by the injured party as if it were a private individual, amenable to court action without claim of immunity, in all those cases, not exempted by the act, where the negligence of its

agents, servants or employees has caused injury or damage to third parties."

This Court should expand its comments made in the **Aetna** case and approve or reject the analysis of 28 U. S. C., Secs. 1346 (b), 2674, made in the **Cerri** case. Until this Court announces the interpretation to be given to said sections there will be serious doubts as to the coverage and applicability of the Federal Tort Claims Act.

POINT IV.

Under the previous point of this argument, we quoted from 28 U. S. C., Sec. 2680 (a), which sets forth the exception to the Federal Tort Claims Act applied by the Court of Appeals in these cases.

Not only has the double exception set forth in said section never been interpreted by this Court, but it is the exception (which is really two) which is relied on most frequently by the Government in cases arising under the Federal Tort Claims Act.

The Court of Appeals for the Seventh Circuit from its examination of the complaints reached the conclusion that petitioners had failed to charge defendant with the execution of a statute or regulation without due care, and, therefore, applied the first of two exceptions found in Section 2680 (a). Possibly the Court felt that petitioners should have said "defendant negligently damaged petitioners **without due care.**" The emphasized words would be repetitious since an allegation of negligence implies a lack of care on the part of a defendant.

The Court of Appeals for the Seventh Circuit also found that all actions of the federal agency charged with the administration of the Migratory Bird Treaty Act, 16 U. S.

C., Sec. 703 et seq., were discretionary and, therefore, fell within the "discretionary function" exception in the second clause of Section 2680 (a).

Whether a failure to protect petitioners' crops from depredations by migratory waterfowl is one of the discretionary functions granted by the Migratory Bird Treaty Act, 16 U. S. C., Sec. 703 et seq., is a question for this Court to decide. In fact, the interpretation given to such exceptions will go a long way in delineating the limits of coverage of the Federal Tort Claims Act.

That the opinion of the Court of Appeals for the Seventh Circuit on this phase of these cases is at variance and in conflict with the analysis of such exception announced by other courts, is ascertainable from the following cases:

Costley v. U. S., 181 F. 2d 723, 724-725;
Hambleton v. U. S., 87 F. Supp. 994, 995;
Oman v. U. S., 179 F. 2d 738, 740-741;
State of Maryland v. Manor Real Estate & Trust Co., 176 F. 2d 414, 419.

This Court should resolve the doubts that lower federal courts have evidenced as to the true meaning of Section 2680 (a). The interpretation of the "discretionary function" exception for which the Government contends in cases where it has been raised, if adopted, would so restrict the coverage of the Federal Tort Claims Act as to nullify its salutary purposes. There are limits to this exception, and this Court should fix those limits. These cases afford this Court such an opportunity.

CONCLUSION.

The judgments of the Court of Appeals for the Seventh Circuit and the District Court involve several important and new questions never before decided by this Court.

The Federal Tort Claims Act is being reviewed from time to time by this Court, and further clarification is needed. The questions raised herein merit the consideration of this Court.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 511

CHARLES SICKMAN, PAUL L. RYAL, KENNETH L. MARTIN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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28 U.S.C. 2680(a) exempts from the Federal Tort Claims Act's coverage two distinct types of claims: (1) those based upon an act or omission of a government employee, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation is valid, and (2) those based upon the performance or failure to perform a discretionary function or duty on the part of a government agency or employee, whether or not the discretion involved be abused.

The court below, in a decision we regard as correct, invoked both parts of Section 2680(a) and thereby denied jurisdiction to the district court to adjudicate crop damage claims asserted against the United States on account of the depredations of wild geese protected by the Migratory Bird Treaty Act. No prior appellate opinion has invoked both phases of this "highly important exception" in the Federal Tort Claims Act. See House Report No. 1287, 79th Congress, 1st Session, on H.R. 181, pages 5-6.[1]

While petitioners' argument, on the merits, that the Government must answer for depredations committed by migratory wild birds may seem frivolous, the tremendous volume of litigation under the Federal Tort Claims Act undoubtedly makes the jurisdictional questions presented by the petition as to the interpretation of "the highly important exception" one which is appropriate for consideration and decision by this Court. The need for such an interpretation is underscored here by the fact that less than three months after the instant decision the same court completely ignored Section 2680(a) in the case of *Stewart* v. *United States,* in which we intend to file a petition for a

[1] All prior opinions discuss only the "discretionary function" aspect of Section 2680(a), ignoring completely its exclusion of claims based upon acts occurring in the execution of a statute or regulation. *Coates* v. *United States,* 181 F. 2d 816 (C.A. 8); *Denny* v. *United States,* 171 F. 2d 365 (C.A. 5), certiorari denied, 337 U.S. 919. See also *Oman* v. *United States,* 179 F. 2d 738 (C.A. 10); *State of Maryland* v. *Manor Real Estate and Trust Company,* 176 F. 2d 414 (C.A. 4).

writ of certiorari. There, as will more fully appear from our petition, the court below held that the United States was negligent in the manner in which it stored and safeguarded certain explosives at a military reservation. It did not find negligence on the part of any identifiable officer or employee of the United States. Yet the method of storing and safeguarding of explosives would seem to involve peculiarly a matter of carrying out orders or regulations on the one hand, or the exercise of discretion on the other.[2]

For the reasons stated, the United States does not oppose the granting of the writ of certiorari.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.

March
~~FEBRUARY~~, 1951.

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[2] The *Stewart* decision, dated January 10, 1951 and not yet reported, was by a divided court with Judge Duffy dissenting from Judge Major's opinion in which Judge Swaim concurred. Neither the dissent nor the majority opinion makes any reference to Section 2680(a), despite the fact that the applicability of that Section seems self evident and, we have been advised, was strongly urged at the rehearing. The instant case was decided by a unanimous court on October 24, 1950, with Judges Major, Duffy, and Kerner sitting.

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